**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 | ) | CG Docket No. 02-278<br>CC Docket No. 92-90 |
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**COMMENTS OF THE**
**PUBLIC UTILITIES COMMISSION OF OHIO**

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## INTRODUCTION AND BACKGROUND

On September 18, 2002, the Federal Communications Commission (FCC or Commission) released a Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding, inviting comments on whether it should establish a national do-not-call list for those telephone subscribers that do not want to receive telemarketing solicitations. Specifically, the FCC questions whether it needs to revise its rules to more effectively carryout Congress' directives in the Telephone Consumer Protection Act (TCPA). In keeping with TCPA, the FCC wants to protect the privacy of individuals and also permit legitimate telemarketing practices. The FCC questions whether it should refine existing rules regarding the use of auto dialers. The FCC questions the effectiveness of company-specific do-not-call lists and requests comment on what action the FCC must take to work with the Federal Trade Commission (FTC) and its proposed national do-not-call list. The Public Utilities Commission of Ohio (PUCO or Ohio Commission) supports the establishment of a national

do-not-call list and appreciates the FCC's continuing effort to maintain enforcement in the area of telemarketing. In its comments, the PUCO supports a number of the proposed modifications and also makes suggestions of how to benefit the consumers.

## DISCUSSION

### The *Central* Hudson Case

In evaluating a do-not-call proposal, the FCC notes that that it must be mindful of the constitutional standards applicable to governmental regulations of commercial speech articulated in *Central* ***Hudson*** *Gas &* ***Elec.*** *Corp. v. Public Service Commission'.* NPRM ¶ 12. Although telemarketing calls represent commercial speech entitled to some First Amendment free speech protection, not all regulation of such speech is unconstitutional. Establishing a national do-not-call registry would protect a substantial governmental interest in residential privacy, and would not violate the U.S. Constitution.

In *Central Hudson*[2], the U.S. Supreme Court articulated a test for determining the validity of a particular regulation of commercial speech.'

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1 *Central Hudson Gas & Elec. Carp. v. Pub. Serv. Comm.,* 447 U.S. 557 (1980)

2 *Id.*

3 The Supreme Court recently affirmed the use of the Central Hudson analysis in *Thompson v. Western States* ***Mrd.*** *Center,* ***535*** U.S. ___ (2002).

**As** a threshold matter, the Court made clear that commercial speech that concerns unlawful activity *or* is misleading is not protected by the First Amendment. Commercial speech that involves lawful activity and is not misleading may be constrained if a substantial governmental interest is directly and narrowly served. Three determinations must be made for a regulation of commercial speech to be constitutionally permissible. First, a substantial governmental interest must be served. Second, if such **an** interest exists, the regulation must directly advance that interest. Finally, the regulation must not be more extensive than is necessary to serve that interest.[4] If each of these three latter inquiries can be answered in the affirmative, then the regulation will survive constitutional scrutiny.

- **A** substantial governmental interest exists.

The U.S. Supreme Court has long "recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views . . ."[5] "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit . . ."[6] In *Frisby v. Schultz*, **a** case involving the picketing of a private residence, the Court stated clearly that "[t]here simply is no right to force speech into the

4 *Central Hudson*, 447 U.S. at 566.

5 *Cohen v. California, 403* U.S. 15, 21 (1971).

6 *Rowan v. United States Post Office,* 397 U.S. 728,737 (1970).

home of an unwilling listener."' **"[A]** special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."'

In part, the Court in *Frisby* relied on its earlier decision in *Rowan v. United States Post Office Dept.*[9] In *Rowan,* the Court upheld a federal statute allowing homeowners to prevent certain mailings from reaching their homes." In a manner analogous to the company-specific do-not-call lists described in the NPRM, the homeowner was required to affirmatively notify the Postmaster General. The sender would then not only be required to refrain from further mailings to that addressee, but would also be required to "delete the name of the designated addressee from all mailing lists owned or controlled by the sender," and refrain from the "sale, rental, exchange or other transactions involving mailing lists bearing the name of the designated addressee."[10] The Court upheld the regulation, finding that "no one has the right to press even 'good' ideas on an unwilling recipient."[11] **"A** mailer's right to communicate must

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7 *Frisby u. Schultz,* 487 U.S. 474,485 (1971).

8 *Id.* at 484-485 (citations omitted).

9 ***Rowan*** *v. United Stales Post Office,* 397 U.S. 728 (1970).

10 ***Id.*** at 729-30.

11 ***Id.***

12 ***Id.*** at 738.

stop at the mailbox of an unreceptive addressee."" Any other holding, according to the Court, would be "to license a form of trespass and would hardly make more sense than to say that a radio *or* television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home."[14]

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[15] The government has a clear and substantial interest in protecting citizens' interest in the privacy of their homes.

- **A national do-not-call registry directly advances the interest in residential privacy.**

The second prong of the *Central Hudson* test requires that restrictions on commercial speech directly advance the asserted governmental interest.[16] **A** national do-not-call registry directly advances the government's interest in providing a means for those citizens who want to protect the privacy of their homes from invasion by unwanted commercial telephone solicitations

The *Central Hudson* analysis is directly applicable to telemarketer calls made to a customer's home. To conclude otherwise would be to hold that a telephone consumer "could

13 *Id.* **at** 736-37.

**14** *Id.*

15 *Carey v. Brown,* **447 U.S.455,471 (1980).**

*16* *Central Hudson,* **447 U.S. at** 566.

not cut off an offensive or boring communication and thus bar its entering his home." Once a person answers the phone, an invasion of privacy has occurred.

A do-not-call registry "leaves the decision" of whether a caller may disturb a homeowner "with the homeowner himself,"[17] and would plainly advance the interest in residential privacy. A do-not-call registry would effectively permit a consumer to place a "no solicitors" notice on their telephone line, comparable to sign posted at the front door. A registry would directly protect the right of an individual "to be let alone" in the privacy of their own home.

- **A do-not-call registry is appropriately narrowly tailored.**

The last prong of the Central Hudson analysis requires that the government's restriction on commercial speech not be more extensive than necessary to advance the government's interests.[18] There must be a "reasonable fit between the means and ends of the regulatory scheme."" This fit should be "in proportion to the interest served."[20] Although not a "least-restrictive-means requirement,"[21] the Court has stated that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the

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17 *Martin v. City of Struthers,* 319 U.S. 141, 148 (1943).

18 *Central Hudson,* 447 U.S. at 566.

19 *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525,561 *(2001).*

20 *Board of Trustees of the State Univ. of New York v. Fox,* 492 U.S. 469, 480 (1989) (quoting In re: R.M.J., 455 U.S. 191,203 (1982)).

21 *Central Hudson,* 447 U.S. at 566.

Government must do so."[22]

**A** national do-not-call registry would preserve the privacy rights of those who put their names on the list, while allowing telemarketers to continue to solicit those who do not affirmatively act. It would narrowly restrict only calls to those homeowners who elect to prevent the intrusion of telephone solicitations into their homes.

**A** national do-not-call registry is a constitutional restriction on invasive unsolicited commercial telemarketing. It directly advances the government's substantial interest in preserving the privacy of the home, but it is narrowly tailored to directly achieve its goals with only minimal infringement on the commercial speech interests of legitimate telemarketers.

Preemption **FCC's National Do-Not-Call List**

The TCPA does not preempt state regulation of telemarketing. The Commission requests comment on the issue of preemption. NPRM ¶¶ 48, 62-63, 66. The TCPA expressly provides that state law is not preempted and that "nothing shall preempt any state law that imposes more restrictive intrastate requirement which prohibit telephone solicitations."[23] Congress also provided that an action can be brought in state court based on a violation of the

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**22** *Thompson v. Western States Mrd. Center.,* 535 U.S. ___, ___ (2002).

*23* 47 U.S.C. § 227(e)(1) (West 2002).

TCPA.[24] There is no preemption of state law in the TCPA

Though federal law can preempt state law without an express statement, there must be some Congressional intention to preempt. Preemption can occur if there is a direct conflict between state and federal law.[25] There is no implied preemption in the TCPA. Whether the TCPA preempted state telemarketing regulation was an issue in the *Van Bergen* case. The Eighth Circuit Court of Appeals held that the TCPA did not expressly preempt the state telemarketing statute; that the TCPA carried no implication that Congress intended to preempt state law; and that the TCPA was intended not to supplant law but to provide interstitial law preventing evasion of state law by calling across state lines.[26]

In ***Van** Bergen v. Minnesota,* a gubernatorial candidate brought an action against the Minnesota State Attorney General, challenging the validity of a state statute that regulated the use of telephone automatic dialing-announcing devices. The Court held that federal law could preempt state law without an express statement, by implying preemption *or* by directly conflicting with the state law. The Court found that the TCPA carried no implication of Congressional intention to preempt state law.[27] The Court went on to say that if Congress

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24 **47** U.S.C § 227(b)(3)(A) (West **2002).**

25 *Van Bergen v. State of Minnesota,* 59 F.3d **1541** (8th **Cir.** 1995), citing **New** *York Conf. of Blue* cross *v. Travelers Ins., 514* U.W. **645,115 S.Ct. 1671,1676 (1995).**

**26** ***Id*. at 1541.**

**27** ***Id***

intended to preempt other state law, that intent could easily have been expressed.[28]

The TCPA affirmatively recognized the existence of telemarketing regulation at a state level and made no attempt to preempt those laws. When discussing the state use of databases, Congress wrote that a state may not, in its regulation of telephone solicitations, require the use of a system that does not include the part of such a single national database that relates to such state.[29] In a similar discussion about the use of permitted databases, the TCPA states that the national database shall "be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing *State* law[.]"[30] The Act is overwhelmingly clear in its intention not to preempt state law.

Interaction **between the FCC** and the States

The FCC seeks comment on how the do-not-call database would work with the state databases. NPRM ¶¶ 60-66. Though some states already have do-not-call databases, others do not. The states and the FCC must work in a cooperative manner in order to maintain the database and enforce the TCPA. From a practical perspective, the FCC will not be able to handle enforcement in all fifty states. The state do-not-call lists that are already in existence are extremely popular, so it is likely that there will be an overwhelming amount of people that sign up for the national list. For the new rules to have any effectiveness, the FCC, the FTC

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*28* ***Id.***

29 47 U.S.C. § 227(e)(2) (West 2002).

*30* 47U.S.C. § 227(c)(3)(J) (West 2002).

and the states will need to gear up for an aggressive enforcement plan from the beginning. The effectiveness of the new rules will be largely dependent upon the aggressive enforcement measures taken. The TCPA allows for action to be brought in state courts. In addition, states are free to continue enforcing their own telemarketing and consumer fraud laws.

A national do-not-call list can be a positive addition for states that already have established lists and also very helpful for those states that do not yet have such a database. State and federal agencies often work together in other areas of the law and, in order to fully effectuate the TCPA, the two will need to share information. The FTC and the FCC must establish one database. The states and the federal agency must be able to share information. For this to occur, the systems will have to be compatible to allow for information sharing.

Concerning enforcement provisions, the PUCO recommends an approach similar to that adopted by the FCC for slamming, where the states and the FCC have collaborated to enforce their requirements (both state and federal requirements). Under this proposal states would opt-in to enforce the FCC/FTC national do-not-call lists. State officials could then coordinate enforcement efforts between the appropriate state agencies. The Ohio Commission already has enforcement procedures for utility companies and utility service providers, other state agencies handle other non-utility issues of consumer protection. The Ohio Commission's proposal on this matter would require a coordination of resources at the state level.

**FTC/FCC Cooperation**

The FCC seeks comment on whether it should adopt rules that compliment the FTC's proposal for a national do-not-call list and existing state do-not-call lists. NPRM ¶ 53. In addition, the FCC seeks comments on whether it should use its authority under the TCPA to extend any national do-not-call list adopted by the FTC to those entities that fall outside the FTC's jurisdiction and what role the FCC should play in enforcing such rules. NPRM ¶ 55.

Any national do-not-call list adopted by the FCC should be seamless and transparent with the FTC's national do-not-call list. Presently, the FCC bas authority under the TCPA to adopt a national do-not-call list for residential customers, while the FTC does not have jurisdiction over certain commercial entities such as banks and common carriers. Together, the FCC and FTC can ensure coverage that maximizes the effectiveness of any national do-not-call list.

Another issue involving residential versus commercial is the wireless customer. Because most wireless customers pay for all calls received, the FCC rules prohibit autodialed or prerecorded message calls to wireless phones. The FCC seeks comments on whether all calls to wireless phones should be considered residential. NPRM ¶ 41. Unless technologies exist that readily enable telemarketers to distinguish between calls made to residential and business wireless customers, all calls made to wireless telephones should be considered residential. The FCC and FTC need to coordinate efforts so that calls to wireless nonresidential customers are covered to the fullest extent of the FTC's jurisdiction and calls to

nonresidential wireless customers not subject to FTC jurisdiction are considered calls to residential customers and thus subject to the FCC's jurisdiction. Regardless as to how the national list is administered and enforced, the PUCO maintains that all involved should endeavor to ensure that the list is consumer fnendly in that it is seamless and transparent to all who subscribe.

**List Subscription Charges**

The Ohio Commission maintains that consumers should not pay a fee to register on a national do-not-call list. Telemarketing industry has engendered the consumer demand for such a list; consequently, the telemarketing industry must be responsible for the costs associated with developing and administrating the list. End-user charges may preclude economically disadvantaged customers from subscribing. Regardless of how nominal a charge may appear, a fee to low-income customers may be prohibitive.

Regarding charges to telemarketers, the PUCO recommends that the do-not-call list be available monthly to telemarketers on an NPA-by-NPA basis. Adopting such an approach will ensure that local marketers can tailor their list purchases to meet there individual, smaller-scale needs. Likewise, such an approach will ensure that those telemarketers operating on a regional or national level will pay their proportionate fair share to develop and maintain the list.

A national do-not call list will benefit the telemarketing industry by making its operations more efficient. Specifically, telemarketers' successful sales compared to the

number of calls made may increase since they will no longer be wasting valuable labor and telecommunications resources by marketing customers who do not want to receive such calls.

The Ohio Commission recommends that the FCC provide various methods for consumer to register on the national do-not-call list. The FCC should provide an 800 interactive voice system, a website registry (including e-mail), and a method to register by mail. Multiple free registration methods would increase the effectiveness of the list and increase consumer participation by allowing consumers to choose a system that they feel comfortable using.

**Overall Effectiveness of the Company-Specific Do-Not-Call Approach**

The FCC requests comment on the overall effectiveness of company-specific do-not-call approach. NPRM ¶ 14. That is, the FCC requests comments on whether such an approach balances the interests of those consumers who wish to continue to receive telemarketing calls, and of the telemarketers who wish to reach them, against the interests of those who object to such calls. The FCC notes that the company-specific do-not-call approach requires consumers to repeat their requests not to be called on a case-by-case basis as calls are received, consequently, the FCC questions whether predictive dialers have rendered useless the company-by-company approach. NPRM ¶ 14. The FCC observes that changes in the marketplace and technological innovations since it adopted the TCPA rules in 1992 may have reduced the effectiveness of the company-specific approach. For example, the widespread use of predictive dialers and answering machine detection technology results in

many "hang-up" or "dead air" calls in which the consumer has no opportunity to request that the telemarketer not call in the future. NPRM ¶ 15. The FCC, therefore, seeks comment on these issues and any other impact that changes in the telemarketing industry over the last decade have had on the overall effectiveness of the company-specific approach. *Id.*

The Ohio Commission submits that the telemarketing industry's pervasive use of predictive dialers have rendered obsolete and virtually ineffective the FCC's current rules concerning company-specific do-not-call lists. If telemarketing calls to customers result in "dead air" because the call was answered too early or the telemarketer is busy with another call, there will be no one on the line for the consumer *to* inform that he or she wants *to* register on a do-not-call list. This frequent (annoying) situation personifies the need for the FCC to supplant its company-specific rules in favor of rules that will establish **a** national do-not- call list. **A** national do-not-call list will afford customers the option to avoid calls place by telemarketers utilizing predictive dialers.

Registering for company-specific do-not-call lists must be as user-friendly as possible. **As** mentioned earlier, Consumers should have access via internet, by mail or toll free calling, to company. Written confirmation should be provided to the customer that his name has been added to the do-not-call list. This notification should also indicate when the registration expires.

**Established** Business **Relationship**

In the TCPA Order, the FCC determined that, based on the record and legislative history, the TCPA permits an "established business relationship" exemption from restriction on artificial or prerecorded message calls to residences. NPRM ¶ 20. The FCC concluded that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. The FCC defined the term "established business relationship" to mean "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the residential subscriber regarding projects or services offered by such person entity, which relationship has not been previously terminated by either party." NPRM ¶ **34.** The FCC invites comment on whether any circumstances have developed that would justify revisiting these conclusions.

Prior relationships between businesses and their established customers is a valid reason for consumers to receive calls from these entities, however, strict guidelines must be put in place. Telemarketers should only be permitted to contact established customers for the purpose of informing them about changes or updates to their current product or service. For example, a lawn care service may call existing customers to inform them of a special offer regarding their landscaping services, but may not call them with an offer for vinyl siding. The Ohio Commission recommends that the FCC require companies operating within a business

relationship exception to maintain a company-specific do-not-call list for those customers desiring to be place on such a list, even though the customers have a business relationship with the company.

The FCC should allow customers to determine, upon subscribing to a list, whether they are willing to receive calls from charitable and not-for-profit organizations. This recommendation would call for the FCC to maintain two subscriber lists, however, the Ohio Commission maintains that this inconvenience would be offset by the benefits enjoyed by both the charitable organization and those subscribers willing to receive such calls.

Consumers registering for a national do-not-call list would naturally believe that they are exempt from receiving *all* telemarketing calls. The FCC should ensure that consumers are informed at the time they register for the do-not-call list that they may receive calls from companies with whom they have an established business relationship and/or charitable and not-for-profit organizations.

**Public Information/Advertising**

Subscribers must be informed about their right to enroll their names on a do-not-call registry. **All** local exchange carriers (LECs) and competitive local exchange carriers (CLECs) should inform subscribers of that right. In order to ensure that subscribers are informed, it is the practice of the Ohio Commission to require LECs and CLECs both to provide annual bill message notification of such rights and to prominently display those rights in the front section of the white pages of any published directory. Both the bill message and directories must

briefly explain how the service works, what calls would be blocked and for how long. This information should also include the means to subscribe: telephone number; mailing address; and email address (or URL). The Ohio Commission acknowledges that the local phone companies are not directly responsible for the problems and customer inconvenience resulting from telemarketing calls. Such a requirement is not unreasonable, however, since the local companies realize revenues from telemarketers directly though local exchange rates or from their IXCs through access charges.

**List Administration**

The FCC requests comment on whether the requirement that companies honor do-not-call requests for ten years is a reasonable length of time for consumers and businesses. In addition, comment is sought on any possible initiatives that would better inform consumers of their right to request placement on a company's do-not-call list. NPRM ¶ 17.

The Ohio Commission supports a reduction from the 10 year requirement to the 5-year time period. The reduction of this timeframe to five years would provide the list administrator with an opportunity to determine if consumers have reevaluated their feelings about receiving telemarketing calls

The PUCO also believes that a reduction to five years will help to ensure the list's accuracy and whether the phone number is still assigned to the subscriber who enrolled.[31]

Finally, if a customer's enrollment to the list is subject to a sunset provision, the Ohio Commission recommends that the list administrator provide at least one notice of this expiration to the customer by at least 60 days before removal from the list. This mailing should also tell the customer how to reenroll. The intent of this recommendation is to ensure that customers continuous subscription to the do not call list will be seamless.

Predictive Dialers

The FCC invites comment on whether a predictive dialer, as **a** form of automatic telephone dialing system, is subject to the ban on calls to emergency lines, health care facilities, paging services, and any service for which the called party is charged for the call. NPRM ¶ 26. The FCC additionally seeks comment on whether predictive dialers should be subject to a ban on calls to emergency lines, health care facilities, paging services or any service in which the called party is charged for the call. NPRM ¶ 29.

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**31** The FCC observes that there is nearly a **20** percent chum in phone numbers annually. NPRM ¶ 51.

Sales solicitation calls to emergency lines, health care facilities, and any service for which a called party is charged for a call must be banned. Emergency lines and health care facilities require telephone lines to remain open for the health and safety of the public. **Any** calls that disrupt the ability of emergency facilities to adequately care for the need of the communities in which they serve must be prohibited. These lines have specific purposes and would not typically result in a successful sales call for the industry.

In addition, telemarketers who choose to utilize predictive dialing technology should be prohibited from blocking or otherwise impeding the transmission of caller ID information. Caller ID information allows the called party who receives a hang-up call a means by which to identify the calling party and request that no further calls be made to that number.

This ability to identify potentially unwanted callers is imperative in the event that a national do-not-call list would not be adopted since customers will need the telemarketer's phone number to decide whether to answer a call. The consumer has few means under which he can combat the ever-increasing numbers of calls being and requiring caller ID would assist the consumer in this situation.

**Abandoned Calls/Caller ID**

The FCC invites comments on whether it should require telemarketers to transmit the name and the telephone number of the calling party, when possible or prohibit them from blocking or altering the transmission of such information. NPRM ¶ 28. The also FCC seeks comments on whether the prohibition of any blocking of Caller ID information by a

telemarketer would alleviate the harm caused by a predictive dialer abandoning a call. NPRM ¶ 29. The FCC requests comment on what impact any changes to its Caller ID rules might have on existing state Caller ID rules. The FCC also invites comment on the whether requiring a maximum setting on the number of abandoned telemarketing calls or requiring telemarketers who use predictive dialers to transmit Caller ID information are feasible options for telemarketers. NPRM ¶¶ 22-26.

The PUCO requires telemarketers to provide the calling party's number (CPN) to the maximum extent the information can be provided. If the FCC were to require telemarketers to not block or alter CPN, this would not conflict with the PUCO's rules regarding Caller ID."

Telemarketers should be prohibited from blocking or otherwise impeding the transmission of Caller ID information. Requiring telemarketers to provide the CPN via Caller ID will allow customers to determine whether to answer the call. This ability to identify potentially unwanted callers is imperative in the event the FCC fails to institute a national do-not-call list. For example, if a caller receives a dead air call for **a** telemarketer utilizing a

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**32** *In the Matfer of the Application of the Ohio Bell Telephone Company to revise its Exchange and Network Services Tariff,* PUCO No. 1, to Establish Regulations, Rates, and Charges **for** Advanced customer Calling Services in Section 8. Case No. 90-467-TP-ATA, 90-471-TP-ATA.

predictive dialer, the CPN will provide the customer with a means to subscribe to that telemarketer's company-specific do-not-call list.

This situation perversely demonstrates the need for a national list, since in many circumstances the customer will incur a toll charge to return the call to the telemarketer. This toll charge would conflict with the TCPA because it would effectively require a customer to pay a fee to subscribe. Requiring telemarketers to disclose their CPN will assist customers in distinguishing between telemarketing calls (which may result in dead air) and harassing calls. Requiring CPN from telemarketers will only benefit those consumers who have purchased Caller ID. Consequently, the FCC cannot rely entirely on requiring telemarketers to provide CPN to address the problem associated with identifying telemarketing and/or abandoned calls.

In response to the FCC inquiries regarding establishing a reasonable threshold for abandoned calls, the Ohio Commission does not believe that setting a maximum on *the* number of abandoned calls will alleviate the inconvenience imposed on the public. Expressed another way, the Ohio Commission finds it virtually impractical and unworkable to amve at a reasonable amount of dropped calls or dead air calls a customer would be willing to receive. One dropped call may be one too many for most customers.

**Telemarketing Calls to CMRS Customers**

Consistent with the FCC's current rules, the Ohio Commission maintains that telemarketing calls to cellular and paging customers (and **any** other service for which a called party is charged) should continue to be banned. These types of calls should be permitted only

when technology advances to the point of permitting the calling party to pay. Until that time, customers of cellular and paging should not be required to pay for these unsolicited telemarketing calls.

Furthermore, customers of these types of services should automatically be placed on any national do-not-call list by the customers' cellular and/or paging companies. The service provider should also be required to notify its customers that they have automatically been placed on the list and provide information regarding how the cellular and/or paging customer can be removed from the do-not-call list, if they so desire.

On a related matter, the FCC's recent decision requiring CMRS local number portability (effective November 2003) further calls for the need to develop a national do-not-call list, That is, after November 2003, wireless telephone numbers can be ported to wireline local numbers, without such a national list to refer, telemarketers may be unknowingly calling wireless numbers that appear to be local exchange customers. Moreover, these wireless customers with local exchange numbers may incur charges for the call. Such charges to wireless customers would be in conflict with the FCC's current rules implementing the **TCPA.**

**Time of Day Restrictions**

The FCC seeks comments on the reasoning of time of the day limitations on the telephone solicitations to residences. NPRM ¶ ***36.*** The Ohio Commission recommends that the calling hours limitations should be further restricted from 9:00 am *to* 9:00 p.m. Anecdotal information received at the PUCO's call center indicates that consumers believe that 8:OO a.m.

is too early for telemarketers to call. Additionally, numerous municipalities have adopted noise ordinances that restrict the use of outdoor power equipment before **9:00** a.m. If municipalities have decided to create a realm of privacy for their residents from noise generated by outdoor power equipment before 9:00 a.m., it is certainly not unreasonable to create a parallel realm of indoor privacy by preventing telemarketers from calling consumers before **9:00** a.m.

**CONCLUSION**

The Ohio Commission thanks the FCC for the opportunity to file comments **in** this proceeding.

Respectfully submitted,

**On Behalf of The Public Utilities Commission of Ohio**

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